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ABSTRACT

The applicability of Fourteenth Amendment procedural due process to private colleges and universities is discussed. After considering state action in private higher education, cases from 11 federal judicial circuits are reviewed to show how courts have applied the various theories of state action. An emerging theory of state action that is developing in the Second and District of Columbia Circuits is also addressed. The federal cases show the general lack of success by complainants at private institutions who claimed protection under both Fifth and Fourteenth Amendment procedural due process provisions. The emerging theory suggests that the relative ease or difficulty of finding state action is contingent to some extent on whether or not racial or sexual discrimination is part of the complaint. At least three approaches have been used to show the existence of state action at private institutions: the delegated power approach, the governmental aid or assistance approach, and the public character or functional approach. Based on a brief review of recent higher education legal literature, it is suggested that absent state action, procedural due process is not judicially mandated at private institutions. Relevant cases for each federal circuit and selected state action cases at private institutions are listed. (SW)

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PROCEDURAL DUE PROCESS IN PRIVATE COLLEGES AND UNIVERSITIES

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PROCEDURAL DUE PROCESS IN PRIVATE COLLEGES AND UNIVERSITIES

I. Introduction

In their book, The Academic Revolution, Jencks and Riesman note the following:

> The distinction between a public and private college was of no special importance during the first two centuries of American higher education. Then, after the Civil War, it became one of the central issues and divisions within the emerging academic system. Today, . . . the distinction seems once again to be losing some of its importance.[1]

Juxtapositioned with this statement by Jencks and Riesman is the focus of this paper: to determine some of the differences between public and private colleges and universities for purposes of the applicability of procedural due process. This paper argues that there are significiant differences between private and public colleges and universities where Fourteenth Amendment procedural due process is involved.

Briefly, this paper will attempt to show by analysis of selected federal case law[2] and legal literature that unless state action is found in private colleges and universities, Fourteenth Amendment procedural due process requirements are not legally required.[3]

This paper is divided into several parts. The first part discusses the concept of procedural due process in terms of its applicability, generally, to private colleges and universities. A brief review of recent higher education legal literature leads to the general conclusion that absent state action, procedural due process is not judicially mandated in private institutions. The second part discusses and defines the general concept of state action and presents various theories used to demonstrate the existence of state action in private institutions. The third part reviews a selected case within each of the eleven Federal judicial circuits in order to show specifically how courts have

applied the various theories of state action. The fourth part reviews an emerging new theory of state action which is developing in the Second and District of Columbia Circuits. This emerging theory suggests that the relative ease or difficulty of finding state action is contingent to some extent on whether or not racial or sexual discrimination is part of the complained of institutional proceeding. The fifth part provides a summary and analysis of selected cases by institutional type.

It should be noted that not all of the judicial findings of fact and conclusions of law from discussed cases are included within the presentation of the cases which follow. Rather, only those salient facts and legal conclusions necessary to understand state action, theories of state action, and the relevance of both to private colleges and universities, are presented. Cases dealing with state action in private colleges are listed by judicial circuit in Table 1.

II. Due Process as Defined and Applied in Private Colleges and Universities

Due process of law has been defined as follows:

> Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.[4]

These procedural safeguards are guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment reads in part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[5] The Fourteenth Amendment reads in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[6] The Fifth Amendment was initially construed as providing limitations for federal, rather than state, government.[7]

The Fourteenth Amendment, on the other hand made the Fifth Amendment concept of due process applicable to the states.[8] In brief the concept of due process is a constitutional concept having its source or existence rooted in constitutional history,[9] with its limitations or protections directed at organizations and employees of state and federal governments.[10]

As used in this paper, therefore, procedural due process appears to be required only of public institutions of higher education, their students and employees:[11]

> Because the Constitution was designed to limit only the exercise of government power, it does not prohibit private individuals or corporations from impinging on such freedoms as free speech, equal protection, and due process. Thus, insofar as the federal Constitution is concerned, a private university can engage in private acts of discrimination, prohibit student protests, or expel a student without affording the procedural safeguards that a public university is constitutionally required to provide.[12]

Brubacher has observed:

> It may come as a surprise that most reviews of the acts of campus officers in the light of civil liberties and the Bill of Rights do not apply to private institutions of higher learning.[13]

And Hollander's conclusion is similar to those of Kaplin and Brubacher:

> Private institutions . . . must meet only contractual or statutory requirements, and are not usually subject to constitutional mandates such as the Fourteenth Amendment requirements for due process and equal protection.[14]

United States Supreme Court cases which similarly support the proposition that due process provisions of the Fourteenth Amendment proscribe only impermissible state action include United State v. Guest,[15] United States v. Price,[16] Evans v. Newton,[17] Burton v. Wilmington Parking Authority,[18] Shelley v. Kraemer,[19] Moose Lodge No. 107 v. Irvis,[20] and Jackson v. Metropolitan Edison Comm.[21]

Classification of an institution as private, however, does not necessarily resolve the issue of determining the relevance of procedural due process requirements to the private college or university:

> How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels posted on them.[22]

Further, under the doctrine of "state action":

> A private institution may retain its intrinsic private nature, but because of various governmental nexi, usually financial or regulatory, the private institution can be deemed to be acting under the 'color of state law.' This determination means that the requirements of the Fourteenth Amendment and derivative civil rights legislation can be applied to private institutions deemed to be taking state action.[21]

Remaining sections will deal more specifically with this state action doctrine.

For purposes of this section and regardless of the general limitation of constitutional safeguards to federal and state entities, there appears to be substantial authority for the conclusion that procedural due process protections appear to be applicable to the private institution only if there is a judicial finding of state action. The litigation strategy involving a procedural due process complaint, therefore, generally includes the attempt to establish the existence of state action on the private institution's campus. But what is state action and how has it generally been applied to private colleges and universities?

III. State Action Defined and Approaches Generally Taken to Show State Action

State action means, literally, the action of the state sufficient to warrant and require the protections inherent in the Fourteenth Amendment to the United States Constitution. Alexendar and Solomon have defined state action as follows:

> In order to find state action at private universities, the state must have 'so insinuated itself' in the affairs of "the" private (U)niversity so as to be judicially 'recognized as a joint participant in the challenged' . . . proceeding.[24]

The United States Supreme Court in Evans v. Newton[25] defined "state action" as follows:

> Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character so as to become subject to constitutional limits placed upon state action.[26]

As applied to private colleges and universities, at least three approaches have been used to show the existence of state action. One approach has been referred to as the delegated power approach.[27] In this approach, the argument is that the government actually delegates a particular task to the private institution on behalf of the government.[28] In such a situation, a college official could act in a private capacity (when carrying out the non-delegated functions of office) as well as in a governmental capacity (when carrying out the delegated functions of office).

A second approach used in the attempt to show state action is the governmental aid or assistance approach.[29] Here, the aggrieved party attempts to aggregate all governmental aid or assistance received by the private institution. The various types of government aid or assistance which have been suggested for aggregation include the granting of a state charter, state and federal student financial aid monies, capital construction grants and loans, and various tax exemption benefits.[30] Presumably the greater the aggregate of governmental benefits the greater are the indicia of state action.

A third approach to showing state action is the public character or function approach.[31] In this approach, the argument made is that the current realities of higher education are such so that "it has become increasingly public in nature."[32] In other words, "the function of private higher education is so essentially public that a governmental standard should judge its performance."[33]

While other approaches have been used to argue for the existence of state action,[34] these three approaches appear to be the primary vehicles which have carried the state action argument. In the reported cases, competing state action arguments and claims are usually weighed and balanced against each other.

As Kaplin has observed:

> Because of varying patterns of governmental assistance and involvement, a continuum exists ranging from the obvious public school (such as the tax-supported state university) to the obvious private school (such as the religious seminary). The large gray area between these extremes provides a continuing source of debate about how far the government must be involved before a 'private' institution may be considered 'public' under the constitution.[35]

These competing approaches to showing state action are illustrated in the following selected federal cases from the various federal judicial circuits.[36]

IV. Approaches to Showing State Action As Applied Specifically to Private Colleges and Universities

The First Circuit case of Lorentzen v. Boston College[37] is illustrative. Lorentzen was an instructor at Boston College but his contract was not continued. He claimed that his contract nonrenewal violated due process. The College argued that his complaint should be dismissed because of the absence of state action. The court observed that Boston College was:

> Chartered by the Commonwealth of Massachussetts, enjoys both state and local tax exemption by reason of its nonprofit status, and receives less than 1% of its income from state grants and contracts.[38]

The court concluded that these factors were insufficient to show state action. The court responded in a similar fashion to the argument that the college "performs functions which are governmental in nature, such as exercising dominion over and providing education to its students."[39]

The Second Circuit case of Stewart v. New York University[40] involved a white female student who applied for but who was denied admission to law school. She argued that this denial deprived her of her civil rights because of a law school policy admitting lesser qualified minority students. The University argued that since no state action was present in its admissions policy, the complaint should be dismissed.

In marshalling facts to support her state action argument, Stewart pre-

sented the following: 1) the Law Center Foundation was tax-exempt; 2) both the State of New York and the United States government had provided funding for various non-law school and law school buildings; 3) over three hundred law students received grants under a State of New York program. The federal government provided several hundred thousand dollars worth of loans; 4) the law school received various grants directly from New York State; and 5) the law school served a public function by making its facilities available for various kinds of law-related public use. The court observed that "plaintiff has not shown the requisite state action . . ."[41] and dismissed the complaint.

A representative Third Circuit case is Pendrell v. Chatham College.[42] This case involved a contract non-renewal of a faculty member who received her Ph.D from Columbia University at the age of 63 and who was hired by Chatham at the age of 64. Her contract was not renewed after four years of service. She claimed that her nonrenewal deprived her of certain constitutional rights.

To show state action, she showed the following connections between the college and governmental branches: 1) charter given by the State of Pennsylvania; 2) various exemptions from state and local taxation; 3) state regulation of various college programs such as education; 4) receipt of a City of Pittsburgh zoning variance; 5) college student receipt of various state loans and scholarships; 6) college receipt of a major federal grant for library construction. Even with all of these contacts, however, the court noted the following:

> Nowhere has it been demonstrated that any governmental body, state or local, has any input whatsoever, let alone control, as to any of Chatham's policy-making groups or as to any of Chatham's ministerial administrative functions.[43]
>
> The Court finds that no state action exists as to Chatham College. Chatham College is not an agency of that state and the actions of its trustees, officers and faculty cannot be found to have been taken under color of state law.[44]

Pendrell's complaint, however, was not dismissed for other reasons.

In the Fourth Circuit Counts v. Voorhees College[45] involved the dismissal of students from the college for protesting the nonrenewal of four faculty contracts. The students claimed that they were disciplined without procedural due process in violation of their constitutional rights. Their complaint argued that Voorhees College was quasi-public because of the public service it offered. The court found that the State neither created, regulated, nor financially supported the college, and dismissed the complaint, noting, "there being no state action, it follows that there is no federal jurisdiction."[46]

In Guillory v. Administrators of Tulane University of Louisiana,[47] a Fifth Circuit case, various black applicants for admission to Tulane University were denied admission to the university solely because of their race. The university argued that it was legally bound to restrict admission because of an earlier restriction made by a founding donor, Paul Tulane. The University further argued that constitutional protections did not apply to private individuals/institutions. The students argued that constitutional protections did apply.

The court considered a variety of arguments which attempted to show state action, including: 1) membership of state officers on the Board; 2) previous state property transferred to the university; 3) property tax exemption; and 4) various favorable statutory acts involving the university. The court after analyzing each of these four arguments concluded that:

> (T)he state action or involvement in the affairs of the Tulane Board is not so significant that it may fairly be said that the actions of the Tulane Board are the actions of the State of Louisiana. To this extent the plaintiffs are not entitled to relief and this court so finds.[48]

In the Sixth Circuit, Blackburn v. Fisk University[49] involved a suit by twelve university students who were suspended without a hearing. The court, in

affirming the dismissal of the complaint by the district court, noted that even though the charter of the university was granted by the state, the university did not have a state-granted power of eminent domain, did not receive revenues from the state, was not controlled by the state, and was not serving a public function. The court concluded:

> We conclude that the well pleaded facts . . . considered cumulatively, do not evidence such State involvement as to transform the actions of Fisk University officials into 'State action.'[50]

In the Seventh Circuit case of Cannon v. University of Chicago,[51] a female applicant refused admission to the medical school sued the university claiming that her refusal was discriminatory under the Civil Rights Act. In the district court decision[52] the court concluded that to raise a claim of state action something more than an allegation that the university receives state and federal aid and is conducted "under Illinois law, custom and usage" must be raised. The court dismissed the complaint.

In the circuit court of appeals decision,[53] Cannon argued that her exclusion from medical school was in violation of her right to equal protection of the law. In rejecting the argument for state action because of the receipt of state and federal financial assistance, the court noted:

> But, even assuming financial aid and assistance by the State in whatever amounts, such aid and assistance is insufficient . . . unless it can be shown that the State has 'affirmatively supported' the particular conduct challenged here.[54]

The court then proceeded to affirm the district court's decision. The Supreme Court[55] reversed but its decision did not deal with the state action issue.

The Eighth Circuit case of Belk v. Chancellor of Washington University,[56] involved a suit which sought to compel the university chancellor to keep the university open so that students who desired to study could continue their education. Apparently widespread student unrest had led to the chan-

cellor's making the request that "students and faculty . . . cease educational activities in order to discuss ways of ending the war . . ."[57]

The Belk court held:

> (T)hat the conduct of the chief executive of a private university, in light of the public function of a private university in education, could amount to sufficient 'state action' in order to grant jurisdiction to this court.[58]

The Belk decision, however, has not been widely followed. One commentator has observed that it is:

> Apparently the only authoritative decision in which the 'public function' argument has been accepted as a basis for a finding of state action on the part of a private university. (emphasis added)[59]

Furunoto v. Lyman[60] is a Ninth Circuit case which involved Stanford University. Stanford students attempted to and did disrupt a physics class taught by Professor William Shockley. The protesting students disliked the professor's views on certain genetic theories. As a result of this disturbance, certain of these students after a hearing were suspended indefinitely from the university. They filed suit claiming deprivation of certain constitutional rights.

The student plaintiffs argued two theories of state action. First, they argued that if an institution performs a public function, its acts can be viewed as state action. Second, they argued that if the State of California is actively involved in the complained of university actions, then those university actions ought to be viewed as state action. The court rejected this view.

The court noted that specified legislative acts related to the university's founding, state granted powers of eminent domain, exemption from property and state income taxes, and state involvement in degree and various other campus programs did not make the acts of the university state action. As the court observed, "These facts do not demonstrate . . . that Stanford should be viewed

as an arm of the State."[61]

In the Tenth Circuit, a representative case on these is Browns v. Mitchell,[62] a case involving the University of Denver. In this case, several university students informed the university chancellor that if a list of given students demands was not met, a sit-in demonstration would be staged. The students were informed that the given student demands would not be met and that any sit-in would result in the severest discipline. The sit-in was staged and the students involved were suspended for one year from the university. The suspended students sought reinstatement to the university and asserted as the basis for their claim to relief that "the proceedings which ultimately resulted in the suspension were lacking in procedural due process"[63] (based on the Fourteenth Amendment).

The following facts were set forth in an attempt to show state action: 1) the university is tax exempt not only under general taxation considerations but also under a special provision where "its non-educational, income producing property is also non-taxable,"[64] and 2) the university performs various functions and services for the public thereby, giving it "the color of a public institution . . . ."[65] The court, however, rejected these arguments and affirmed the lower court's dismissal of the students' complaint.

In the District of Columbia Circuit, Greenya v. George Washington University[66] involved termination of a part-time instructor from the university. The instructor taught off-campus courses (one course each semester) at the Naval School of Hospital Administration. The university provided these instructional services under a contract with the Navy. At this termination the instructor was not provided any procedural rights. As a result, he claimed that his termination violated both his First and Fifth Amendment constitutional rights.

The arguments for federal action in this case were basically four: 1) the

university received a corporate charter from the appropriate governmental chartering agency; 2) the university is exempt from taxation under both federal and local law; 3) the university receives federal funding for specified programs and capital expenditures; and 4) the university course taught was taught on federal property.

The appeals court, however, rejected the argument that these items taken together constitute federal action. With regard to the monetary arguments, the court noted:

> We are clear that the mere receipt of government loans or funding by an otherwise private university is not sufficient involvement to trigger constitutional guarantees in the University's relations with its employees.[67]

With regard to the "service rendered on government property" argument, the court observed that:

> This is of no importance in light of the evidence that he (the instructor) was always under the supervision and control of University officials, and that he maintained no contractual relations with the Navy.[68]

The appeals court upheld the district court's finding that procedural due process protections were not required under the Fifth Amendment.

These cases from the various federal judicial circuits illustrate the various approaches which have been used to assert the state action argument. The cases also show the general lack of success by complainants in private institutions who have attempted to redress legal grievances by claiming protection under both Fifth and Fourteenth Amendment procedural due process provisions.

A line of cases is developing, however, in the Second, Third, and District of Columbia Circuits which suggest that a finding or non-finding of state action in private colleges and universities may be contingent on the nature of the asserted right violated. The following section reviews several of the represen-

tative cases which demonstrate this approach to showing state action.

V. State Action in the Context of Racial and Sexual Discrimination

With regard to racial discrimination the following cases are illustrative.

In the Second Circuit, Powe v. Miles[69] involved the suspension of several Alfred University students because they disrupted an ROTC ceremony. Alfred University was made up of several constituent units two of which were the Liberal Arts College and the Ceramics College. The Ceramics College was operated by the University by contract expressly for and on behalf of the State of New York. A state statute had expressly declared that the actions of Alfred, with regard to the Ceramics College, were the acts of the state. Four of the students disciplined were in the Liberal Arts College and three were in the Ceramics College. The court found state action with regard to the Ceramics students but not with regard to the Liberal Arts students. Thus the Ceramics students were entitled to due process while the Liberal Arts students were not. The court specifically noted that it would have been more willing to find state action with regard to the Liberal Arts students if racial discrimination had been involved:

> No one would question for a moment that the establishment of discriminatory admission policies for CC by the Alfred University trustees--not simply against blacks but against Jews or redheads--would constitute state action . . .
>
> (D)iscrimination may stand somewhat differently, because of the peculiar offensiveness of the state's taxing all citizens for objectives from the benefits of which a particular category is arbitrarily excluded or disadvantaged.[70]

The Second Circuit case of Wahba v. New York University[71] involved the dismissal of a nontenured associate professor of research from the NYU School of Medicine. His principal work at the university involved various federal research grants. Wahba claimed that his dismissal without a hearing was in violation of his

constitutionally protected due process rights. The district court dismissed his complaint and the appeals court affirmed based on a lack of a finding of state action. The district court, however, observed as follows:

> Were plaintiff alleging some form of discrimination on the part of defendants, the very degree of governmental involvement I now hold insufficient to 'carry on its back' the particular constitutional rights here advanced might well 'rise to the level of state action.'[72]

In Grafton v. Brooklyn Law School,[73] another Second Circuit case, two students were dismissed from the law school because of academic deficiencies. They claimed a variety of constitutional deprivations, including free speech, right to counsel, and procedural due process. In affirming the district court's dismissal of the action, the appeals court made the following comments regarding racial discrimination and state action:

> It could well be that such grants by the state . . . would afford a ground for constitutional complaint if the charge here were an admission policy discriminating against racial or religious groups. But while a grant or other index of state involvement may be impermissable when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of state action 'when the action in question is alleged to affront other constitutional rights.'[74]

The District of Columbia Circuit case of Williams v. Howard University[75] involved a student who was refused readmission to a private medical school. He alleged that the basis for his exclusion was racial discrimination and that he was arbitrarily denied procedural due process. In support of his procedural due process claim the student attempted to demonstrate federal action by showing that Howard University received federal funds and held tax-exempt status. The court noted that these factors were not sufficient to show that the "Government exercises some form of control over the actions of Howard."[76] With regard to the claim of racial discrimination, however, the court reached the opposite conclusion:

> We assume that the allegation of substantial federal funding would be

> enough to demonstrate governmental action as to appellant's claim of racial discrimination.[77]

The court rejected the claims of the student litigant, however, for other reasons.

These several cases would appear to indicate that whenever litigation in the private college involves as part of the complaint an allegation of racial discrimination, there is a likelihood that courts may find state action as part of the complained of proceeding. A similar likelihood may also exist where allegations of sexual discrimination are involved. Illustrative cases follow.

The Second Circuit case of Weise v. Syracuse University[78] involved two women, one of whom claimed sexual discrimination as a reason for refusal to hire, and the other who claimed sexual discrimination as a reason for termination from employment. The Weise court discussed and distinguished between one type of harm (racial discrimination) from the other (sexual discrimination):

> Class-based discrimination is perhaps the practice most fundamentally opposed to the stuff of which our national heritage is composed, and by far the most evil form of discrimination has been that based on race.
>
> (I)t is not necessary to put sex discrimination into the same hole as race discrimination to hold that in this case a less stringent state action standard should be employed than in the discipline cases.[79]

In essence, the Weise court developed a hierarchy of federal protections, each requiring a different level of evidence to sustain a finding of state action. Listed in order of constitutional protections requiring less evidence of state action to constitutional protections requiring greater evidence of state action, protected categories are as follows: racial discrimination, sexual discrimination, and other constitutional rights. In other words, it would appear to be more difficult to demonstrate state action for a procedural due process claim which does not involve claims of racial discrimination than it would be to demonstrate state action for one which does.

In addition to the Second and District of Columbia Circuits it appears that the only other circuit which has made the nature of the challenged institutional activity a criterion for affecting the state action determination has been the Third Circuit. Even so, the Third Circuit cases have not been uniformly consistent. Several examples from that circuit are illustrative.

In Isaacs v. Board of Trustees[80] two faculty members at Temple University were terminated allegedly in retaliation for the exercise of their First Amendment free speech rights. They claimed that their termination was also in violation of their Fourteenth Amendment procedural due process rights. The court denied the university's motion for summary judgment. The university had argued that since racial discrimination was not involved, the court should demand the very highest level of proof before permitting a finding of state action. The court rejected this approach, stating in footnote eleven:

> It is difficult, and perhaps impossible, to arrange federal constitutional rights in an ascending hierarchy of value. What is clear is that any deprivation of such a right, whether to the equal protection of the laws as guaranteed by the Fourteenth Amendment or to the freedoms of speech and association as guaranteed by the First Amendment, is a matter of extreme importance to the person who suffers the deprivation.[81]

Sament v. Hahnemann Medial College and Hospital[82] is representative of the view opposite to Isaacs and more in harmony with the Second Circuit decisions. Sament was employed at Hahnemann for several years as an assistant professor of medicine. After several years of service he was told his contract would not be renewed. He filed suit, arguing that his non-retention without reasons or a hearing violated his Fourteenth Amendment procedural due process rights.

In granting the institution's motion for summary judgment while concluding that the action of the institution would not be deemed state action the court observed that a different result may have resulted if racial discrimination had been involved in the complained of proceeding:

> Moreover, with the possible exception of racial discrimination by recipients of government funds, mere financial support for particular projects represents insufficient state involvement to trigger Constitutional guarantees for those dealing with the recipient.[83]

VI. Conclusion

The state action determination is becoming increasingly complex. There does appear to be support for the conclusion that procedural due process in the absence of state action is not generally required of private colleges and universities. Table 2[84] data appear to support this conclusion. Again, since the existence of state action in a private college and university is generally a condition precedent to the applicability of constitutional due process requirements, the absence of a judicial finding of state action would generally preclude the applicability of procedural due process requirements to private colleges and universities.[85]

In conclusion, there does appear to be support for the observation that there are differences between public and private colleges and universities insofar as the applicability of Fourteenth Amendment procedural due process is required.[86] Whether or not this view of procedural due process as applied to private colleges and universities will obtain for the future remains to be seen.

Footnotes

[1]Christopher Jencks and David Riesman, The Academic Revolution (Chicago: The University of Chicago Press, 1977), p. 257.

[2]Primary case law sources consist of selected cases from 1970-79.

[3]See Eugene B. Habecker, "Tenured and Non tenured Faculty, Termination, and Due Process: Faculty Termination Procedures in American Private Colleges and Universities (Ph.D. dissertation, The University of Michigan, 1981). From his review of case law, the author identifies a variety of Fourteenth Amendment procedural due process guidelines.

[4]Henry C. Black, Black's Law Dictionary, Revised 4th Edition (St. Paul, Minn.: West Publishing Company, 1968), p. 590.

[5]William A. Kaplin, The Law of Higher Education (San Franciso: Jossey-Bass Publishers, 1978), pp. 464, 465.

[6]Ibid., p. 466.

[7]Thomas J. Norton, The Constitution of the United States (New York: Committee for Constitutional Government, Inc., 1965), p. 213.

[8]Richard Kluger, Simple Justice (New York: Vintage Books/Random House, 1977).

[9]Gerald Gunther and Noel T. Dowling, Constitutional Law (Mineola, N.Y.: The Foundation Press, Inc., 1970), pp. 796-798.

[10]J. W. Peltason, Understanding the Constitution (Hinsdale, Ill.: Dryden Press, 1976), p. 189.

[11]Kaplin, op. cit., p. 20.

[12]Ibid., pp. 20, 21.

[13]John Brubacher, The Courts and Higher Education (San Francisco: Jossey-Bass, Inc., 1978), p. 142.

[14]Patricia A. Hollander, Legal Handbook for Educators (Boulder, Colo.: Westview Press, Inc., 1978), p. 10.

[15]383 U.S. 745 (1966).

[16]383 U.S. 787 (1966).

[17]382 U.S. 292 (1966).

[18]365 U.S. 715 (1961).

[19]334 U.S. 441 (1948).

[20]407 U.S. 163 (1972).

[21]419 U.S. 345 (1974).

[22]Trop v. Dulles, 356 U.S. 86 (1958), p. 94.

[23]Harry T. Edwards and Virginia Davis Nordin, Higher Education and the Law (Cambridge, Mass.: Institute for Educational Management, 1979), pp. 29, 30.

[24]Kern Alexander and Erwin S. Solomon, College and University Law (Charlottesville, Va.: The Michie Company, 1972), p. 510.

[25]382 U.S. 296 (1966).

[26]Ibid., p. 299.

[27]Robert O'Neil, "Private Universities and Public Law," 19 Buffalo Law Review 155, 168-169 (1970).

[28]See for example Powe v. Miles, 294 F. Supp. 1269 (W.D. N.Y. 1968), 407 F. 2d 73, 32 ALR 3d 846 (2nd Cir. 1968).

[29]Annotation, "Action of Private Institutions of Higher Education as Constituting State Action, or Action Under Color of State Law, for PurposFourteenth Amendment and 42 U.S.C.A. Section 1983," 37 ALR Fed 601-671 (1978).

[30]Comment, "Sex Discrimination in College Admissions: the Quest for Equal Educational Opportunities," 56 Iowa Law Journal 209, 218-219 (1970).

[31]Kaplin, op. cit., p. 23.

[32]O'Neil, op. cit., p. 168.

[33]Ibid., p. 169.

[34]Reitman v. Mulkey, 367 U.S. 369 (1967).

[35]Kaplin, op. cit., p. 21.

[36]See Table 1.

[37]440 F. Supp. 464 (D.C. Mass. 1977), 577 F.2d 720 (1st Cir. 1978), cert. den. 440 U.S. 924 (1979).

[38]440 F. Supp. 464 (1977), p. 465.

[39]Ibid.

[40]430 F. Supp. 1305 (S.D.N.Y. 1976).

[41]Ibid., pp. 1312, 1313.

[42]370 F. Supp. 494 (W.D. Pa. 1974).

[43]Ibid., p. 499.

[44]Ibid., p. 500.

[45]312 F. Supp. 598 (D.S.C. 1970), aff'd 439 F.2d (4th Cir. 1971).

[46]312 F. Supp. 598 (1970), p. 607.

[47]212 F. Supp. 674 (E.D. La. 1962), aff'd and remanded 306 F.2d 489 (5th Cir. 1962).

[48]212 F. Supp. 674 (1962), p. 687.

[49]443 F.2d 121 (6th Cir. 1971).

[50]Ibid., pp. 123, 124.

[51]406 F. Supp. 1257 (N.D. Ill., E.D. 1976), aff'd 559 F.2d 1063 (7th Cir. 1976), rev'd 441 U.S. 677 (1979).

[52]406 F. Supp. 1257 (1976), p. 1257.

[53]559 F. 2d 1063 (1976), p. 1257.

[54]Ibid., p. 1071.

[55]441 U.S. 677 (1979).

[56]336 F. Supp. 45 (E.D. Mo., E.D. 1970).

[57]Ibid., p. 46.

[58]Ibid., p. 49.

[59]37 ALR Fed 619 See also Thigpen, "The Application of Fourteenth Amendment Norms to Private Colleges and Universities," 11 Journal of Law and Education 171, 186 (1982): (T)he Belk view of state action represents an exception rather than the rule. Little judicial authority exists for the proposition that education, particularly at the college and university level, is a government function."

[60]362 F. Supp. 1267 (N.D. Cal. 1973).

[61]Ibid., p. 1277.

[62]409 F.2d 593 (10th Cir. 1969).

[63]Ibid., p. 594.

[64]Ibid., p. 595.

[65]Ibid., p. 596.

[66]167 App. D.C. 379, 512 F.2d 556 (D.C. Cir. 1975), cert. den. 423 U.S. 995 (1975).

[67]512 F.2d 556 (1975).

[68]Ibid., p. 562.

[69]294 F. Supp. 1269 (W.D.N.Y. 1968), 407 F.2d 73, 32 ALR 846 (2nd Cir. 1968).

[70]407 F.2d 73 (1968), p. 82.

[71]371 F. Supp. 567 (S.D.N.Y. 1973), aff'd 492 F.2d 96 (2nd Cir. 1974), cert. den. 419 U.S. 874 (1974).

[72]371 F. Supp. 567 (1973), p. 570.

[73]478 F.2d 1137 (2nd Cir. 1973).

[74]Ibid., p. 1142.

[75]__App. D.C.__, 528 F.2d 658 (D.C. Cir. 1976), cert. den. 429 U.S. 850 (1976).

[76]528 F.2d 658 (1976), p. 660.

[77]Ibid., 661.

[78]522 F.2d 397 (2nd Cir. 1975).

[79]Ibid., p. 406

[80]385 F. Supp. 473 (E.D. Pa. 1974).

[81]Ibid., p. 485.

[82]413 F. Supp. 434 (E.D. Pa. 1976), aff'd 547 F.2d 1164 (3rd Cir. 1977).

[83]413 F. Supp. 434 (1976), p. 439.

[84]Cases included in these tables generally consist of reported cases between 1970-1979 involving private institutions of higher education as reported in the Carnegie Typology groupings Research I and II, Doctorate I and II, Liberal Arts I and II, and Comprehensive Universities and Colleges I and II. See A Classification of Institutions of Higher Education (Berkeley, Calif.: The Carnegie Commission on Higher Education, 1976).

[85]It should be noted that no reported private higher education cases between 1970-1979 holding that state action exists or is supportable could be found for the following federal judicial circuits: District of Columbia; Tenth; Ninth; Seventh; Sixth; and Fourth. The cases which have come from those circuits have upheld the finding of "no state action." The amount of litigation in these matters from these six circuits, however, has been limited. Cases supporting or holding that state action exists or is supportable in private colleges and universities can be found in the remaining five circuits with all but two of those cases coming from the following federal judicial circuits: First; Second; and Third. The Fifth and Eighth Circuits each have one such case. While not the subject of this paper, it should be noted that over half of the reported cases pertaining to the existence of state action in private institutions of higher education (1970-1979) have come from the First, Second, and Third federal judicial circuits.

[86]While state action litigation, as reported in the tabular data, has generally involved all but one of the eight Carnegie types used in this study, a significant majority of the federal litigation has involved research I and II universities as well as doctorate granting I and II universities. In the same manner, the majority of state action litigation finding that state action exists or is supportable, as reported in the tabular data, has involved research I and II universities, doctorate granting universities I, and comprehensive universities and colleges I and II. During the 1970's, therefore, it appears that there has been no such successful litigation in liberal arts colleges I and II.

TABLE 1

FEDERAL JUDICIAL CIRCUIT PRIVATE HIGHER EDUCATION CASES, CITATIONS: 1970 - 1979

	Case Name (listed alphabetically)
	First Circuit
	Berrios v. Inter American University, 535 F. 2d 1330 (1st Cir. 1976), 37 ALR Fed 596
Y	Buckton v. National Collegiate Athletic Association, 366 F. Supp. 1152 (D. Mass. 1973)
Y	Jones v. National Collegiate Athletic Association, 392 F. Supp. 295 (D. Mass. 1975)
	Krohn v. Harvard Law School, 552 F. 2d 21 (1st Cir. 1977)
	Lorentzen v. Boston College, 440 F. Supp. 464 (D. Mass. 1977), 577 F. 720 2d (1st Cir. 1978), cert. den. 440 U.S. 924 (1979)
	Second Circuit
Y	Coleman v. Wagner College, 429 F. 2d 1120 (2nd Cir. 1970).
	Grafton v. Brooklyn Law School, 478 F. 2d 1137 (2nd Cir. 1973)
	Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D. N.Y. 1968)
	Stewart v. New York University, 430 F. Supp. 1305 (S.D.N.Y. 1976)
	Wahba v. New York University, 371 F. Supp. 567 (S.D.N.Y. 1973), 492 F. 2d 96 (2nd Cir. 1974), cert. den. 419 U.S. 874 (1974)
Y	Weise v. Syracuse University, 522 F. 2d 397 (2nd Cir. 1975)
	Winsey v. Pace College, 394 F. Supp. 1324 (S.D.N.Y. 1975)

TABLE 1--Continued

	Case Name (listed alphabetically)
	Third Circuit
	Brown v. Villanova University, 378 F. Supp. 342 (E.D. Pa. 1974)
	Brownley v. Gettysburg College, 338 F. Supp. 725 (M.D. Pa. 1972)
	Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974)
Y	Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974)
	Fourth Circuit
	Counts v. Voorhees College, 439 F. 2d 723 (4th Cir. 1971)
	Fifth Circuit
	Blouin v. Loyola University, 506 F. 2d 20 (5th Cir. 1975)
	Gonzalez v. Southern Methodist University, 536 F. 2d 1071 (5th Cir. 1976), cert. den. 430 U.S. 987 (1977)
	Gorman v. University of Miami, 414 F. Supp. 1022 (D. Fla. 1976)
Y	Hammond v. University of Tampa, 344 F. 2d 951 (5th Cir. 1965)
	Sixth Circuit
	Blackburn v. Fisk University, 443 F. 2d 121 (6th Cir. 1971)
	Seventh Circuit
	Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D. Ill., E.D. 1976), aff'd 559 F. 2d 1063 (7th Cir. 1976), rev'd 441 U.S.677 (1979)

TABLE 1--Continued

	Case Name (listed alphabetically)
	Cohen v. Illinois Institute of Technology, 524 F. 2d 818 (7th Cir. 1975), cert. den. 425 U.S. 943 (1976)
	Eighth Circuit
Y	Belk v. Chancellor of Washington University, 336 F. Supp. 45 (E.D. Mo. 1970)
	Ninth Circuit
	Furunoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973)
	Tenth Circuit
	McLeod v. College of Artesia, 312 F. Supp. 498 (D.N. Mex. 1970)
	Rowe v. Chandler, 332 F. Supp. 336 (D. Kan. 1971)
	District of Columbia
	Greenya v. George Washington University, 167 App. D.C. 379, 512 F. 2d 556 (D.C. Cir. 1975), cert. den. 423 U.S. 995 (1975)
	Spark v. Catholic University of America, 167 U.S. App. D.C. 56, 510 F. 2d 1277 (D.C. Cir. 1975)
	Williams v. Howard University, 528 F. 2d 658 (D.C. Cir. 1976), cert. den. 429 U.S. 850 (1976)

Y - indicates state action established or supportable.

TABLE 2

SELECTED PRIVATE INSTITUTIONS (listed alphabetically) AND RELATED STATE ACTION CASES WITH RESULTS: 1970 - 1979

Institution	Carnegie Type	Case(s)	State Action Established or Supportable	
			Yes	No
Artesia, College of	Not given	McLeod v. College of Artesia (1970		X
Boston College	Doc. G. I	Lorentzen v. Boston College (1979)		X
Boston University	Res. I	Buckton v. National Collegiate Athletic Association (1973)	X	
Brooklyn Law School	Sch. of Law	Grafton v. Brooklyn Law School (1973)		X
Catholic University	Res. II	Spark v. Catholic University of America (1975)		X
Chatham College	L. Arts I	Pendrell v. Chatham College (1974)		X
Chicago, University of	Res. I	Cannon v. University of Chicago (1979)		X

TABLE 2--Continued

Institution	Carnegie Type	Case(s)	State Action Established or Supportable	
			Yes	No
Columbia University	Res. I	Grossner v. Trustees of Columbia University (1968)		X
Emporia, College of	Not given	Rowe v. Chandler (1971)		X
Fisk University	L. Arts II	Blackburn v. Fisk University (1971)		X
George Washington University	Res. II	Greenya v. George Washington University (1975)		X
Gettysburg College	C.U.C. II	Brownley v. Gettsburg College (1972)		X
Harvard University	Res. I	Krohn v. Harvard Law School (1977)		X
Howard University	Res. II	Williams v. Howard University (1976)		X
Illinois Institute of Technology	Doc. G. I	Cohen v. Illinois Institute of Technology (1976)		X
Inter-American University	C.U.C. I	Berrios v. Inter-American University (1986)		X

TABLE 2--Continued

Institution	Carnegie Type	Case(s)	State Action Established or Supportable	
			Yes	No
Loyola University	C.U.C. I	Blouin v. Loyola University (1975)		X
Miami, University of	Res. I	Gorman v. University of Miami (1976)		X
New York University	Res. I	Wahba v. New York University (1974)		X
		Stewart v. New York University (1976)		X
Northeastern University	Doc. G. I	Jones v. National Collegiate Athletic Association (1975)	X	
Pace College	C.U.C. I	Winsey v. Pace College (1975)		X
Pennsylvania University of	Res. I	Rackin v. University of Pennsylvania (1974)	X	
Southern Methodist University	Doc. G. I	Gonzalez v. Southern Methodist University (1977)		X
Stanford University	Res. I	Furunoto v. Lyman (1973)		X

TABLE 2--Continued

Institution	Carnegie Type	Case(s)	State Action Established or Supportable	
			Yes	No
Syracuse University	Res. II	Weise v. Syracuse University (1975)	X	
Tampa, University of	C.U.C. II	Hammond v. University of Tampa (1965)	X	
Villanova University	C.U.C. I	Brown v. Villanova University (1974)		X
Voorhees College	L. Arts II	Counts v. Voorhees College (1971)		X
Wagner College	C.U.C. I	Coleman v. Wagner College (1970)	X	
Washington University	Res. I	Belk v. Chancellor of Washington University (1970)	X	